Supreme Court, U. S.
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IN THE

Supreme Court of The United States

NO. 78-188

MELLON BANK, N.A.
Petitioner,

versus

SOUTHLAND MOBILE HOMES OF SOUTH CAROLINA, INC.

and

ASSOCIATES FINANCIAL SERVICES COMPANY, INC.
Respondents.

PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of the State of South Carolina

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MELLON BANK, N.A.
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SOUTHLAND MOBILE HOMES OF SOUTH CAROLINA, INC.

and

ASSOCIATES FINANCIAL SERVICES COMPANY, INC.
Respondents.

PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of the
State of South Carolina

Petitioner, Mellon Bank, N.A., prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina, Opinions Numbers 20654 and 20655, entered on April 3, 1978. Rehearings were denied on May 10, 1978.

OPINIONS BELOW

The opinions of the Supreme Court of South Carolina are reported in 244 S.E.2d at 211 and 212 and appear in the Appendix, *infra*. (App. 15 & 17) The Order of the Court of Common Pleas for Sumter County is unreported and appears in the Appendix. (App. 26)

JURISDICTION

The opinions of the Supreme Court of South Carolina were entered on April 3, 1978. Timely petitions for rehearing were filed and were denied on May 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the courts of the State of South Carolina can, in a transitory cause of action, assert jurisdiction and venue over Petitioner, a national banking association chartered under the laws of the United States, headquartered in Allegheny County, Pennsylvania, and having no offices in the State of South Carolina.

STATUTES INVOLVED

The National Bank Act, 12 U.S.C. § 94, provides as follows:

> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

The McFadden Act, 12 U.S.C. § 36, provides in relevant part as follows:

> The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following: . . .
>
> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . .
>
> (f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

28 U.S.C. § 1348 provides as follows:

> The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.
>
> All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

S.C. Code § 36-2-803 (1976) appears in the Appendix (App. 32)

STATEMENT OF THE CASE

This case, alleging breach of contract, was brought by Southland Mobile Homes of South Carolina, Inc. ("Southland") against Associates Financial Services Company, Inc. ("Associates") and Mellon Bank, N.A. ("Mellon Bank") in the Court of Common Pleas for Sumter County, South Carolina. Associates answered and asserted a cross-complaint against Mellon Bank. Pursuant to South Carolina procedure Mellon Bank made a special appearance to challenge the jurisdiction of the court. (App. 24-25) The Court of Common Pleas for Sumter County entered its order dated February 16, 1977, asserting that it had jurisdiction over Mellon Bank pursuant to the South Carolina long-arm statute despite the provisions of 12 U.S.C. § 94. (App. 26)

Mellon Bank appealed to the Supreme Court of South Carolina. Although this case involves a single lawsuit, the South Carolina Supreme Court rendered two opinions, one dealing with the appeal as to Associates and one dealing with the appeal as to Southland. In the opinion dealing with the appeal as to Associates, the South Carolina Supreme Court in Opinion No. 20655 (App. 17) affirmed the Court of Common Pleas for Sumter County, holding (1) that the state court had jurisdiction over Mellon Bank pursuant to the state long-arm statute, S.C. Code § 36-2-803 (1976) (App. 32); (2) that Mellon Bank was "located" in the State of South Carolina within the meaning of 12 U.S.C. § 94; and (3) that Mellon Bank was operating a branch bank in Sumter County, South Carolina, within the meaning of 12 U.S.C. § 36 because it purchased commercial (chattel) paper from Associates, which had acquired the paper from Southland, which in turn had previously acquired the paper from its customers.

In a separate opinion dealing with the appeal as to Southland the South Carolina Supreme Court held that the then attorney for Mellon Bank was several days late in perfecting the appeal against Southland and affirmed

the dismissal of the appeal in Opinion No. 20654. (App. 15) Rehearings of these decisions were denied on May 10, 1978. (App. 23-24)

Since no further review of the decisions is possible under South Carolina law, Petitioner seeks review by this Court of the important federal questions decided. Pursuant to subsection 5 of Rule 23 of this Court, it is appropriate to consolidate review of both decisions into one Petition for Certiorari.

REASONS FOR GRANTING CERTIORARI

This case presents novel and important questions involving the application of federal jurisdictional and venue statutes pertaining to transitory actions against national banks in state courts.

The case involves an attempt by the state courts of South Carolina to assert jurisdiction over an out-of-state national bank pursuant to a state long-arm statute and contrary to the provisions of the National Bank Act and the Supremacy Clause of Article VI of the United States Constitution.

The latest decision of this Court involving 12 U.S.C. § 94 was *Citizens & Southern National Bank v. Bougas*, 434 U.S. 35 (1977). However, that case addressed itself only to an intra-state application of the statute. The question decided was whether a national bank having its principal office in one county of the State of Georgia could be sued in another county of the same state in which it maintained an authorized branch. Here, Mellon Bank is headquartered and chartered as a national bank in Allegheny County, Pennsylvania, but the South Carolina courts have asserted jurisdiction over it, even though it has no offices within the State of South Carolina and can have none under the McFadden Act, 12 U.S.C. § 36(c). The South Carolina courts have applied a state statute in derogation of federal statutes and have done violence to the interpretation of federal statutes. This precedent should not be permitted to stand.

A. THE SOUTH CAROLINA COURTS HAVE ASSERTED JURISDICTION OVER AN OUT-OF-STATE NATIONAL BANK IN A TRANSITORY ACTION PURSUANT TO A STATE LONG-ARM STATUTE IN DEROGATION OF THE NATIONAL BANK ACT AND ALSO IN DEROGATION OF THE SUPREMACY CLAUSE OF ARTICLE VI OF THE UNITED STATES CONSTITUTION.

In asserting jurisdiction over Mellon Bank, the South Carolina courts have relied upon the South Carolina long-arm statute, S. C. Code § 32-2-803 (1976). (App. 32) Without conceding that jurisdiction would be obtained under this statute if it were applicable, Petitioner asserts that such a state statute cannot be applied in derogation of federal statutes to reach an out-of-state national bank.

Federal statutes govern exclusively where a national bank may be sued on a transitory cause of action. For a century decisions of this Court have consistently held that national banks are creatures of federal statutes and that their regulation and amenability to suit are governed exclusively by federal law. The following quotations will suffice to illustrate this point:

> The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks, and how far these institutions shall be subject to state control, is undeniable. National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the government may permit. *Van Reed v. People's National Bank,* 198 U.S. 554, 555 (1905); quoted in part in *Mercantile National Bank v. Langdeau,* 371 U.S. 555, 558-9 (1963).

> National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court. *Davis v. Elmira Savings Bank,* 161 U.S. 275, 283 (1896).
>
> Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them [national banks], nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is "an abuse, because it is the usurpation of power which a single State cannot give." Against the national will "the States have no power, by taxation or otherwise, to retard, impede, burthen or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government." *Farmers' & Mechanics' National Bank v. Dearing,* 91 U.S. 29, 34 (1875) (citations omitted).

Controlling is *Mercantile National Bank v. Langdeau,* 371 U.S. 555 (1963). In *Langdeau* an action was brought in Travis County, Texas, against a national bank which was located in Dallas County, Texas. The Texas court relied upon venue provisions in the Texas Rules of Civil

Procedure. This Court reversed. The *Langdeau* decision is absolutely clear on two points: (a) the federal venue and jurisdictional statutes are mandatory and not permissive, and (b) state jurisdictional and venue statutes do not control suits brought in state court against national banks.

Analogous is *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976). That case held that the venue provisions of the Securities Exchange Act of 1934 did not supersede the provisions of 12 U.S.C. § 94 in a suit brought against an out-of-state national bank alleging violation of the Securities Exchange Act. If an apparently conflicting federal statute cannot override the provisions of the National Bank Act, *a fortiori* a state statute cannot.

Thus, the attempts of the Supreme Court of South Carolina and the Court of Common Pleas for Sumter County to invoke state court jurisdiction over Mellon Bank pursuant to the South Carolina long-arm statute are complete nullities. To allow this decision to stand would emasculate the forum requirements of the National Bank Act, both as to its plain language and as interpreted by this Court.

B. THE SOUTH CAROLINA COURT'S INTERPRETATION OF "LOCATED" UNDER 12 U.S.C. § 94 CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

In no way and in no sense of the word can Mellon Bank be deemed "located" in the State of South Carolina as that term is used in 12 U.S.C. § 94 and 28 U.S.C. § 1348. As shown in an affidavit in the record in support of the special appearance of Mellon Bank to contest jurisdiction, Mellon Bank had no offices, employees, subsidiaries or affiliates in the State of South Carolina. Basically, all Mellon Bank did was purchase chattel paper from Associates, which had acquired the paper from Southland, which in turn had acquired it from customers of Southland who

had purchased mobile homes. The same situation was presented in *Michigan National Bank v. Robertson*, 372 U.S. 591 (1963), where a national bank headquartered in Michigan purchased installment paper from a house trailer dealer in Nebraska. Like the petitioner in *Robertson*, Mellon Bank cannot be sued outside its home state without its consent. To the same effect is *National Bank of North America v. Associates of Obstetrics and Female Surgery*, 425 U.S. 460 (1976). There, an attempt was made in state court in Utah to sue a national bank headquartered in New York. Like the Michigan bank and like Mellon Bank, the New York bank had no offices or agents in the state of the attempted forum. This Court vacated the judgment of the Utah Supreme Court, restating the doctrine that the provisions of 12 U.S.C. § 94 are mandatory, not permissive, and do not permit a state court to reach beyond its boundaries to assert jurisdiction over a national bank in another state.

Although it does not reach the statutory interpretation questions, *Bank of America v. Whitney Central National Bank*, 261 U.S. 171 (1923), held that jurisdiction could not be had over a national bank under factual circumstances similar to the case at bar. The Whitney Central National Bank was sued in district court in New York although its headquarters and banking offices were located in New Orleans, Louisiana. Whitney had correspondent relationships with six banks in the State of New York where it maintained deposit accounts. These correspondent banks, among other things, paid drafts drawn on Whitney against letters of credit of Whitney issued in New Orleans, received securities on behalf of Whitney, and made payment for such securities. This Court held that Whitney was not "found" within New York State where it was sued.

C. THE SOUTH CAROLINA COURTS HAVE INTERPRETED THE TERM "BRANCH" BANK IN A MANNER TOTALLY INCONSISTENT WITH FED-

ERAL STATUTES AND DECISIONS OF THIS COURT.

The holding by the trial and appellate courts of South Carolina that Mellon Bank, by purchasing chattel paper from respondent Associates in South Carolina, created a branch bank of Mellon Bank in South Carolina is ridiculous on its face. 12 U.S.C. § 36(f) defines a branch bank as follows:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office or any branch or place of business located in any State or Territory of the United States or in the District of Columbia *at which deposits are received, or checks paid, or money lent.* (Emphasis added)

There is nothing in the record below to suggest that Mellon was in any way conducting a banking operation or operating a branch bank in the State of South Carolina. There is nothing to indicate that it received deposits, paid checks or loaned money in that state.

This Court discussed this definition in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969). That case arose in Florida, where branch banking is prohibited. The national bank, which was headquartered and chartered in Florida, established an off-premises receptacle for deposit of cash and checks. It operated an armored car service to bring the material left in the receptacle to the bank itself. This Court correctly held the receptacle to be a "branch" under the federal statute and within the prohibition of the Florida law against branch banking. Thus, the alleged branch in *Dickinson* was an off-premises means of receiving deposits.

It is quite apparent that Mellon Bank was not receiving deposits, paying checks or lending money in South Carolina. The South Carolina courts have asserted that Mellon Bank was lending money in South Carolina, but this assertion is not correct. Mellon Bank was purchasing in-

stallment paper which had been given by purchasers of mobile homes to a South Carolina dealer. Mellon Bank was not lending money either to the dealer or to the persons who had purchased the mobile homes. It was purchasing an investment as it might purchase bonds. The affidavit of the officer of Mellon Bank given to the court in resisting jurisdiction is quite clear on the point. The trial court quoted the following two paragraphs from the affidavit:

> That Mellon Bank, N.A. maintains no office, retail or wholesale, in the State of South Carolina. That there are no employees or agents of Mellon Bank, nor are there any employees or agents of any subsidiary or affiliate in the State of South Carolina.
>
> That the Defendant, Mellon Bank, N.A. does purchase commercial paper from a number of financing institutions throughout the country as a regular course of business. One of these financial institutions from which it purchases commercial paper is Associates Financial Company, Inc., an Indiana corporation. Associates Financial does do business in South Carolina and as a result of this some of the commercial paper which Mellon Bank has purchased from Associates Financial did originate in South Carolina. However, this is a matter of Mellon Bank doing business with a corporation which in turn does business in the State of South Carolina rather than Mellon Bank doing any business in the State of South Carolina. (App. 27)

There is no factual basis for saying that Mellon Bank was operating a "branch" in South Carolina in defiance of the McFadden Act, 12 U.S.C. § 36(c), when, indeed, it had nothing resembling an office in the State of South Carolina.

D. THERE IS NO LEGAL OR FACTUAL BASIS FOR HOLDING THAT MELLON BANK HAS IN ANY WAY WAIVED THE PROVISIONS OF 12 U.S.C. § 94.

The Supreme Court of South Carolina did not treat the question of waiver, but the trial court held that Mellon Bank had waived its immunity from suit in South Carolina. (App. 29) Apparently, this holding was based upon the relationship between Mellon Bank and Associates and the fact that Mellon Bank had enforced installment sale contracts in the courts of South Carolina.

Although this Court has not defined waiver under 12 U.S.C. § 94, the cases which have held that a waiver of jurisdictional objections had occurred have generally based the holding upon conduct which occurred after the commencement of the lawsuit. Here, Mellon Bank entered a special appearance to contest jurisdiction (App. 24-25) and has contested the jurisdiction of the South Carolina courts throughout this litigation. This case is thus distinguishable from those which hold there was a waiver. See Anno., 1 A.L.R.3d 904.

E. THE STATE SUPREME COURT DECISIONS ARE APPROPRIATE FOR REVIEW AT THIS TIME.

Although the decisions of the South Carolina Supreme Court do not dispose of the merits of this case, they constitute a final judgment on the jurisdictional and venue issues, and it would serve no purpose for this Court to delay review of the federal questions presented. The state court decisions are final within the meaning of 28 U.S.C. § 1257 and are thus now ripe for review. This case is analogous to *Local 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542 (1963), wherein this Court stated as follows:

> [W]e believe our power to review this case rests upon solid ground. The federal question raised by petitioner in the Georgia court, and here, is whether the Georgia courts had power to proceed with and determine this controversy. The issue ripe for review is not whether a Georgia court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction nor is it the question of whether federal or state law governs a case properly before the Georgia courts. What we do have here is a question of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power . . . . 371 U.S. at 548 (citations omitted).

By similar reasoning this Court has reviewed decisions of state courts holding that jurisdiction and venue existed as to national banks although the cases had not yet been determined on the merits. *Citizens & Southern National Bank v. Bougas*, 434 U.S. 36 (1977); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963).

The jurisdictional and venue questions here are severable from the merits of the case, and a trial on the merits would add nothing to the record for the determination of the jurisdictional and venue questions.

CONCLUSION

The decision of the Supreme Court of South Carolina conflicts with the National Bank Act and the decisions of this Court construing that Act. A reversal of this decision is required.

Wherefore, for the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Southland Mobile Homes of South Carolina, Inc., a South Carolina Corporation — Respondent,

v.

Associates Financial Services Company, Inc., and Mellon Bank, N.A. of which Mellon Bank, N.A. is — Appellant.

Appeal From Sumter County

Dan F. Laney, Judge

Opinion No. 20654
Filed April 3, 1978

AFFIRMED

Drawdy Law Offices, of Columbia, for appellant.

Donald E. Rothwell, of Columbia, for Associates Financial Services Company, Inc.

Weinberg, Warner, Brown & McDougall, of Sumter, for respondent.

GREGORY, A. J.: This action was brought by Southland Mobile Homes of South Carolina, Inc. [Southland] against Associates Financial Services Company, Inc. [Associates Financial] and Mellon Bank, N.A. [Mellon Bank] to recover damages for breach of contract. Associates Financial cross-claimed against its co-defendant, Mellon Bank. Mellon Bank challenged the circuit court's jurisdiction by special appearance and the Honorable Dan F. Laney held the court had jurisdiction.

Mellon Bank filed notice of intention to appeal on February 26, 1977. The proposed case and exceptions were served on counsel for Associates Financial within thirty days thereafter. The proposed case and exceptions were mailed to counsel for Southland on March 30, 1977, more than thirty days after the notice of intention to appeal was filed.

On motion of Southland, Judge Laney dismissed Mellon Bank's appeal as to Southland for failing to serve the proposed case and exceptions within the time allowed by Section 18-9-70, 1976 Code of Laws of South Carolina, and Circuit Court Rule 49. Mellon Bank appeals from Judge Laney's order dismissing its appeal.

Where, as here, the appellant gave timely notice of intention to appeal to this Court but failed to serve its proposed case and exceptions within the time provided by the statute and Circuit Court Rules, it was the duty of the circuit judge to dismiss the appeal. Associated Petroleum Carriers v. Mutual Properties, Inc., 235 S.C. 195, 110 S.E.2d 861 (1959).

AFFIRMED.

LEWIS, C. J., LITTLEJOHN, NESS and RHODES, J. J., concur.

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Southland Mobile Homes of South Carolina, Inc., a South Carolina Corporation, Plaintiff,

v.

Associates Financial Services Company, Inc., and Mellon Bank, N.A. of which Associates Financial Services Company, Inc. is Respondent,

and

Mellon Bank, N.A. is Appellant.

Appeal From Sumter County

Dan F. Laney, Judge

Opinion No. 20655

Filed April 3, 1978

AFFIRMED

Drawdy Law Offices, of Columbia, for appellant.

Weinberg, Bryan, Warner, Brown & McDougall, of Sumter, for plaintiff.

Donald E. Rothwell, of Columbia, for respondent.

GREGORY, A. J.: This action was brought by Southland Mobile Homes of South Carolina, Inc. [Southland] against Associates Financial Services Company, Inc. [Associates Financial] and Mellon Bank, N.A. [Mellon Bank] to recover damages for breach of contract. Associates Financial cross-claimed against its co-defendant, Mellon Bank. Mellon Bank challenged the circuit court's jurisdiction by special appearance, and appeals the lower court's order finding the circuit court has jurisdiction over Mellon Bank.

Mellon Bank served both Southland and Associates Financial with notice of its intention to appeal the lower court's jurisdictional finding. On the subsequent motion of Southland, however, the lower court dismissed Mellon Bank's appeal as to Southland for failing to serve the proposed case and exceptions within the time allowed by Section 18-9-70, 1976 Code of Laws of South Carolina, and Circuit Court Rule 49. We affirmed that order in Southland Mobile Homes of South Carolina, Inc. v. Associates Financial Services Company, Inc. and Mellon Bank, N. A., ... S.C. ....., ... S.E.2d ..... (1978) (Op. No. 20654, filed April 3, 1978).

Mellon Bank's appeal as to Associates Financial was submitted without oral argument under Rule 29 of our Rules of Practice.

The sole question presented by this appeal is whether the circuit court has jurisdiction over Mellon Bank.

On appeal from an order of the lower court finding it has jurisdiction, this Court will affirm the lower court's finding unless it is unsupported by the evidence or influenced by error of law. Jacobs v. Association of Independent Colleges and Schools, 265 S.C. 459, 219 S.E.2d 837 (1975).

Mellon Bank is a national banking association organized under the provisions of Title 12 of the United States Code. Its principal place of business is located in Allegheny County, Pennsylvania.

Both jurisdiction and venue in actions against national banks are governed by federal statutes.

28 U.S.C.S. § 1348 (1977) controls jurisdiction:

> The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12 [12 U.S.C.S. §§ 21 et seq.], to enjoin the Comptroller of the Currency, of any receiver acting under his direction, as provided by such chapter.
>
> All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

12 U.S.C.S. § 94 (1977) controls venue:

> Suits, actions, and proceedings against any association under this title may be had in any district, or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

Under 28 U.S.C.S. § 1348 Mellon Bank is deemed a citizen of South Carolina and thus subject to the jurisdiction of our courts if it is *located* here.

Under 12 U.S.C.S. § 94 venue is proper in "any State, county, or municipal court . . . having jurisdiction in similar cases" where Mellon Bank is *located*.

In Holson v. Gosnell, 264 S.C. 619, 216 S.E.2d 539 (1975), cert. denied 423 U.S. 1048, 96 S.Ct. 774, 46

L.Ed.2d 636, this Court held that a national bank is *located* in any county in this State in which it has a branch bank. The United States Supreme Court affirmed the principle of that holding in Citizens and Southern National Bank v. Bougas, ... U.S. ....., 98 S.Ct. 88, 54 L.Ed.2d 218 (1977).

For purposes of national banking association, branch banks are defined in 12 U.S.C.S. § 36 (1977). Subsection (f) of that section provides as follows:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

The United States Supreme Court discussed 12 U.S.C.S. § 36(f) in First National Bank v. Dickinson, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969), reh. denied 396 U.S. 1047, 90 S.Ct. 677, 24 L.Ed.2d 693:

> Although the definition [12 U.S.C.S. § 36(f)] may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more. It should be emphasized that, since § 36(f) is phrased in the disjunctive, the offering of any one of the three services mentioned in that definition will provide the basis for finding that "branch" banking is taking place. Thus not only the taking of deposits but also the paying of checks or the lending of money could equally well provide the basis for such a finding. 396 U.S. at 135, 90 S.Ct. at ....., 24 L.Ed.2d at 320-321.

Thus, if Mellon Bank has received deposits, paid checks, or lent money in a county in this State it will have branch banked in that county and will be considered located there.

Based on the affidavit of Bruce Gordon, Associates Financial's operations manager in Sumter County, and an attached contract between Associates Financial and Mellon Bank dated December 20, 1972, the lower court made the following findings:

> Without question the exhibits and evidence presented establish that the Associates' office in Sumter, South Carolina, received checks made payable to the Mellon Bank, that it loaned money of the Mellon Bank and conducted all business necessary to be completed with the receipt of the funds and the disbursement of them pursuant to explicit directions of the Mellon Bank as to all places of procedure. Upon a review of all of the facts it would appear that branch banking was in fact taking place at the Associates' office for the benefit of Mellon throughout the tenure of the contract between these defendants.

The lower court found Mellon Bank had received and loaned money in Sumter County through Associates Financial and thus was branch banking in Sumter County within the meaning of 12 U.S.C.S. § 36(f). Additionally, the lower court found Mellon Bank had sufficient contacts with this State to permit the exercise of State court jurisdiction under Section 36-2-803, 1976 Code. Since these findings are supported by the evidence and were not influenced by error of law, they are binding on this Court on appeal. Jacobs, *supra*.

Clearly the Sumter County Court of Common Pleas would have jurisdiction over this action unless Mellon Bank is granted an exemption by the cited federal statutes. Under 12 U.S.C.S. § 36(f) Mellon Bank was branch banking in Sumter County through Associates Financial and thus is located there. Holson, *supra*. Accordingly, Mellon Bank is a citizen of this State and subject to the jurisdiction of our courts under 28 U.S.C.S. § 134, and venue is proper in Sumter County under 12 U.S.C.S. § 94.

Finding no error in the order of the lower court, we affirm.

LEWIS, C. J., LITTLEJOHN, NESS and RHODES, J. J., concur.

DENIAL OF PETITION FOR REHEARING AS TO OPINION NO. 20654

Petition Denied

S/ J. Woodrow Lewis

S/ Bruce Littlejohn

S/ J. B. Ness

S/ Wm. L. Rhodes, Jr.

S/ George T. Gregory, Jr.

May 10, 1978

[Note: The Petition for Rehearing was denied by the foregoing order endorsed on the cover of the petition by the justices of the South Carolina Supreme Court.]

DENIAL OF PETITION FOR REHEARING AS TO OPINION NO. 20655

Petition Denied

S/ J. Woodrow Lewis

S/ Bruce Littlejohn

S/ J. B. Ness

S/ Wm. L. Rhodes, Jr.

S/ George T. Gregory, Jr.

[Note: The Petition for Rehearing was denied by the foregoing order endorsed on the cover of the petition by the justices of the South Carolina Supreme Court.]

STATE OF SOUTH CAROLINA
County of Sumter

IN THE COURT OF COMMON PLEAS

Southland Mobile Homes of South Carolina, Inc.,
a South Carolina Corporation, Plaintiff,

vs.

Associates Financial Services Co., Inc.,
and The Mellon Bank, Defendants.

SPECIAL APPEARANCE

The Defendant, The Mellon Bank, by and through its undersigned attorneys, does herewith make a Special Appearance for the sole purpose of asserting the lack of jurisdiction of this Court over this said Defendant in this action,

The ground of this objection being, *inter alia,* that whereas this Defendant is a National Banking Association organized under the Provisions of Title twelve (12) of the United States Code; and whereas this said Defendant is located in the County of Allegheny, in the State of Pennsylvania; and whereas Federal Law requires that suits against this said Defendant can only be had in a State Court in the state and county in which the said Defendant is located, this Court is without jurisdiction over this said Defendant in this action,

WHEREFORE, this Defendant requests that this Court determine that this said Defendant is not subject to the jurisdiction of this Court in this action.

DRAWDY & NICHOLSON

S/ BY: William J. Nicholson

Columbia, South Carolina
June 4, 1975

STATE OF SOUTH CAROLINA
County of Sumter

IN THE COURT OF COMMON PLEAS

Southland Mobile Homes of South Carolina, Inc.,
a South Carolina Corporation, Plaintiff,

vs.

Associates Financial Services Co., Inc.,
and The Mellon Bank, Defendants.

SPECIAL APPEARANCE

The Mellon Bank, by and through its undersigned attorneys, having already made a Special Appearance with respect to the Summons and Complaint of the Plaintiff for the sole purpose of asserting the lack of jurisdiction of this Court over The Mellon Bank in this action, does herewith make a Special Appearance with respect to the Cross-Complaint of the Associates Financial Services Co., Inc., for the sole purpose of asserting the lack of jurisdiction of this Court over The Mellon Bank in this action.

The ground of this objection being, *inter alia,* that whereas this Defendant is a National Banking Association organized under the Provisions of Title Twelve (12) of the United States Code; and whereas this said Defendant is located in the County of Allegheny, in the State of Pennsylvania; and whereas Federal Law requires that suits against this said Defendant can only be had in a State Court in the State and County in which the said Defendant is located, this Court is without jurisdiction over this said Defendant in this action.

WHEREFORE, this Defendant requests that this Court determine that this said Defendant is not subject to the jurisdiction of this Court in this action.

DRAWDY & NICHOLSON

S/ BY: William J. Nicholson

Columbia, South Carolina
June 20, 1975

ORDER OF COURT OF COMMON PLEAS FOR SUMTER COUNTY FILED FEBRUARY 16, 1977

(Reprinted from transcript of record before Supreme Court of South Carolina, pp. 6-13)

ORDER (CONFIRMING JURISDICTION)

This matter came before the Court upon the Special Appearance of The Mellon Bank by and through William J. Nicholson and Leo A. Dryer, Jr., of the law offices of J. Wesley Drawdy, on February 13, 1977.

Also present were M. M. Weinberg, Jr., attorney for the Plaintiff, and Donald E. Rothwell, attorney for Associates Financial Services Company, Inc.

This action was instituted by Southland Mobile Homes of South Carolina, a South Carolina corporation, on the 12th day of May, 1975, against Associates Financial Services Company, Inc. and The Mellon Bank. Shortly after service, Associates Financial Services Company, Inc., answered and cross-claimed against The Mellon Bank. The Mellon Bank then served Notice of Special Appearances as to the Complainant and the Cross-Complainant.

Mellon takes the position that as a national banking association organized under the provisions of Title 12 of The United States Code located in Allegheny County, Pennsylvania, that Federal Law requires that all actions against Mellon be brought only in the State and County in which Mellon is located and that therefore this Court has no jurisdiction over it.

The Defendant, The Mellon Bank, submitted an affidavit of Charles B. Jarrett, Jr., Vice President and Counsel of Mellon Bank, N.A., dated the 19th day of November, 1976, and the arguments presented by legal counsel for Mellon basically restated the contents of this affidavit, and, in addition, set out that Mellon was not subject to the jurisdiction of this Court due to the immunity provided by Title 12 of the United States Code.

It is appropriate to make reference to certain portions of Mellon's affidavit, as follows:

> 3. That Mellon Bank, N.A. maintains no office, retail or wholesale, in the State of South Carolina. That there are no employees or agents of Mellon Bank, nor are there any employees or agents of any subsidiary or affiliate in the State of South Carolina.
>
> 9. That the Defendant, Mellon Bank, N.A. does purchase commercial paper from a number of financing institutions throughout the country as a regular course of business. One of these financial institutions from which it purchases commercial paper is Associates Financial Company, Inc., an Indiana corporation. Associates Financial does do business in South Carolina and as a result of this some of the commercial paper which Mellon Bank has purchased from Associates Financial did originate in South Carolina. However, this is a matter of Mellon Bank doing business with a corporation which in turn does business in the State of South Carolina rather than Mellon Bank doing any business in the State of South Carolina.

Both of the paragraphs taken out of the affidavit make direct reference to the crux of the argument before the Court.

The Defendant, Associates, submitted an affidavit of its Operations Manager in Sumter, South Carolina, dated the 13th day of January, 1977. A review of this affidavit, together with attachments and exhibits presented conclusively shows that the Bank had full control of all activities of Associates insofar as any procedures connected with the Associates' handling of Mellon's loans in this State. It further appears that Associates was merely a service company and Mellon's agent for the consummation

of the various transactions upon which this action is founded; and this was buttressed by the deposition testimony of A. H. Henderson, a former manager of Associates in Sumter. Mr. Henderson fully corroborates the affidavit submitted by Associates insofar as it relates to the transactions between Mellon and Associates during the entire tenure of the contract between the parties, and further shows the relationship between these Defendants as set out hereinabove.

At the present time the only construction that could be given to the relationship of the Defendants is that Associates was, in fact, the agent of Mellon for the purpose of buying retail paper on mobile homes and for handling the transactions with the seller of said mobile home and paper, all being done subject to the explicit directions of Mellon.

The Defendant, Mellon, apparently relies upon Title 12, Sec. 94 of the U. S. Code as follows:

> "Actions and proceedings against any association under this chapter may be had in any district or territorial Court of the United States held within the district in which such association may be established, or in any State, County, or municipal Court in the City or County in which said association is located having jurisdiction in similar cases. R.S. 5198; Feb. 18, 1875, 80 1, 18 Stat. 320; Mar. 3, 1911, c. 231, 291, 36 Stat. 1167."

Therefore, a decision must be made as to whether or not this particular Section under the facts and circumstances as here presented is sufficient to deprive this Court of jurisdiction.

A construction of this portion of the U.S. Code of Laws is found in Title 12, Sec. 36(F) of the U.S. Code of Laws:

> "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

It is asserted by the Defendant, Associates, and by the Plaintiff that Mellon's activities through and by its Agent, Associates, at the Sumter location did, in fact, constitute Associates a branch bank of Mellon for the purpose of this action.

Without question the exhibits and evidence presented establish that the Associates' office in Sumter, South Carolina, received checks made payable to the Mellon Bank, that it loaned money of the Mellon Bank and conducted all business necessary to be completed with the receipt of the funds and the disbursement of them pursuant to explicit directions of the Mellon Bank as to all places of procedure. Upon a review of all of the facts it would appear that branch banking was in fact taking place at the Associates' office for the benefit of Mellon throughout the tenure of the contract between these Defendants.

A similar situation was considered by the U. S. Supreme Court in *First National Bank in Plant City, Florida v. Dickinson,* 90 Supreme Court 337 (1969), wherein the United States Supreme Court decided in a situation very similar to this that the activities such as conducted by Associates for and in behalf of Mellon constituted the establishment of a branch bank. This matter has been treated in South Carolina in the case of *Holsen v. Gosnell,* 216 S.E. 2d 539, S.C. decided in 1975 which appears to adopt the position set out above.

In addition to the establishment of the branch bank, the position was taken by this Plaintiff and this Defendant, Associates, that the immunity of Mellon was waived by the actions of Mellon in that during the tenure of the contract between Mellon and Associates, and prior to this time, Mellon had been conducting business within the

State of South Carolina, had been discounting paper, lending money and suing on the contracts. It was shown to the Court that the public records of the State of South Carolina contain several legal actions involving suits upon security agreements by Mellon against various Defendants and under the authority of the decision of the *First National Bank vs. Morgan,* cited at 132 U.S. 141 (1889), the Bank has exhibited conduct which is inconsistent with the retention of its immunity from the jurisdiction of this Court. It has waved such immunity, if, in fact, it did have the same.

Without question, jurisdiction may be established by waiver, as has been so decided in various cases throughout this country; *Western National Bank of Amarillo vs. Bobby Lawrence Hix, et al.,* Tex. Civ. App. 1976, 533 S.W. 2d 859; *Bank of America v. Whitney Central National Bank,* 261 U.S. 171 (1923); *County of Okeechobee et al. vs. Florida National Bank of Jacksonville, et al.,* 112 Fla. 309 150 So. 124 (1933), *Joseph Lichtenfels, et al. vs. North Carolina National Bank, et al.,* 260 N.C. 146, 132 S.E. 2d 360 (1963) and *Continental National Bank et al. vs. Folsom,* 78 Ga. 449, 3 S.E. 269 (1887).

A review of these authorities easily establishes that this question of waiver has been considered and decided in numerous jurisdictions, and these courts have held without exception that National banks are estopped from claiming the privilege of immunity when they have performed acts inconsistent with a retention of immunity, exactly as the conduct of Mellon is exhibited herein.

In addition to the foregoing, it would appear to this Court that this matter is completely controlled by the Uniform Commercial Code as adopted by this State in 1966.

All of the transactions which arose out of the contractual agreement entered into between Associates and Mellon Bank, concern security agreements governed by Title 10 of the South Carolina Code of Laws, as amended. The testimony, arguments, affidavits, and pleadings before me,

clearly indicate that there is sufficient cause to adjudicate that there is jurisdiction over the Mellon Bank pursuant to and under South Carolina Code Sections 10.2-801 through 803 10.2. This statute expressly holds that personal jurisdiction against an out of state Defendant may be based on a number of different acts by said Defendant and it appears from the argument of counsel and Memorandum submitted that this statute would apply because of the fact: "(a) that the Defendant was transacting business within this state; (c) that the Defendant committed a tortious act in whole or in part within this state provided the Plaintiff's view of the facts are correct and, further (d) that the Defendant regularly did business and solicited business within this state and derived substantial revenue from services and goods furnished within the state; (e) Defendant appears to have an interest in real property within this state; (g) the Defendant appears to have entered into a contract to be performed in whole or in part within this state;"

It clearly appears that the acts of the Defendant have brought it clearly within the purview of this statute insofar as jurisdiction is concerned. This Court, does, in addition, make substantial note of the cases of *Leroy Ellison, et al. vs. Rock Hill Printing and Finishing Company, et al.,* 347 F. Supp. 436 (1972), *William B. Peeler vs. South Carolina Helicopters, Inc., et al.,* 211 S.E. 2d 344 (1975), and *The Duplan Corporation v. Deering Milliken, Inc., et al.,* 334 F. Supp. 703 (1971) in coming to its conclusion that there does exist jurisdiction, in all particulars, over The Mellon Bank.

IN PASSING, this Court will make note of what appears to be at least one substantial land transaction within the jurisdiction of the State of South Carolina which establishes the active participation in business transactions in this State by The Mellon Bank and its subsidiaries.

NOW, THEREFORE, it appears to the Court that the Mellon Bank is subject to suit in this state by virtue of the

fact that it has, during the time in question, conducted a system of branch banking within the borders of this State, and, further, that if it enjoyed any immunity which under the more recent statutes does not appear to be the case, that this immunity has effectively been waived by the conduct of Mellon as exhibited in the deposition of A. H. Henderson, and the various affidavits presented. It further appears that notwithstanding all of the foregoing, that the Uniform Commercial Code as adopted by the State of South Carolina completely controls the situation between the parties hereto and under this Code, Mellon is subject to suit in the State of South Carolina.

NOW, THEREFORE, it is herewith

ORDERED, ADJUDGED AND DECREED: That the motion made by the Defendant, The Mellon Bank, in its special appearance before this Court, be, and the same is hereby overruled.

AND IT IS SO ORDERED:

Dated February 16, 1977
Sumter, South Carolina

DAN F. LANEY, JR., JUDGE
THIRD JUDICIAL CIRCUIT

S.C. Code § 36-2-803 (1976).

Personal jurisdiction based upon conduct.

(1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's

(a) transacting any business in this State;

(b) contracting to supply services or things in the State;

(c) commission of a tortious act in whole or in part in this State;

(d) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State; or

(e) having an interest in, using, or possessing real property in this State; or

(f) contracting to insure any person, property or risk located within this State at the time of contracting; or

(g) entry into a contract to be performed in whole or in part by either party in this State; or

(h) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

(2) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him, and such action, if brought in this State, shall not be subject to the provisions of § 15-7-100(3).

[Note: S.C. Code § 15-7-100(3) authorizes a change of venue when the convenience of witnesses and the ends of justice would be promoted by the change.]

Supreme Court, U. S.
FILED
AUG 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 78-188

MELLON BANK, N.A., PETITIONER,

versus

SOUTHLAND MOBILE HOMES OF SOUTH CAROLINA, INC.

and

ASSOCIATES FINANCIAL SERVICES COMPANY, INC., RESPONDENTS.

BRIEF OF RESPONDENT, SOUTHLAND MOBILE HOMES OF SOUTH CAROLINA, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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BRIEF OF RESPONDENT, SOUTHLAND MOBILE HOMES OF SOUTH CAROLINA, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

I

Do the State Court decisions rest on an adequate and independent state ground as to the Respondent, Southland Mobile Homes?

ARGUMENT

I

Do the State Court decisions rest on an adequate and independent state ground as to the Respondent, Southland Mobile Homes?

Respondent, Southland Mobile Homes, asserts that this is not a proper case in which this Court should exercise its discretionary power of review. The longstanding, controlling, jurisdictional principle has been applied in numerous cases, and *Herb v. Pitcairn,* 324 U. S. 118, 65 S. Ct. 459 39 L. Ed. 789 (1944) succinctly states it as follows:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdoch v. Memphis,* 20 Wall, 590, 636, 22 L. Ed. 429; *Berea College v. Kentucky,* 211 U. S. 45, 53, 29 S. Ct. 33, 34, 53 L. Ed. 81; *Enterprise Irrigation District v. Farmers' Mutual Canal Co.,* 243 U. S. 157, 164, 37 S. Ct. 318, 320, 61 L. Ed. 644; *Fox Film Corp. v. Muller,* 296 U. S. 207, 56 S. Ct. 183, 80 L. Ed. 158. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. . . . 324 U. S. at 125, 126.

Petitioner, Mellon Bank, in its Petition for Writ of Certiorari maintains that "This case presents novel and important questions involving the application of federal

jurisdictional and venue statutes pertaining to transitory actions against national banks in state court." (Pet. 5.) Without conceding that such assertion has substantive validity as to either of the Respondents, it certainly does not illuminate the status of Mellon Bank in this litigation insofar as Southland Mobile Homes is concerned.

The Opinion of the South Carolina Supreme Court that is applicable to Southland Mobile Homes (Pet. 15, 16) affirms a lower court's (Circuit Court's) decision that Mellon Bank's appeal to the State Supreme Court from a prior Circuit Court's order (holding Mellon Bank subject to suit in South Carolina by both Southland Mobile Homes and Associates Financial Services) should be dismissed as to Southland Mobile Homes for failure to timely perfect its appeal as to it. Mellon Bank's Petition (Pet. 4, 5) clearly sets forth the status of the litigation below and the status of the respective parties. Section 18-9-70, Code of Laws of South Carolina, (1976) and Circuit Court Rule No. 49, relied on by the Circuit Court and the Supreme Court in dismissing Mellon Bank's appeal as to Southland Mobile Homes, are quoted in the Appendix to this Brief. (App. 9.)

In sum total, Mellon Bank failed to adhere to correct state appellate procedures in its quest to seek review by the State's highest appellate court of a lower court's decision which Mellon Bank now maintains involve adverse rulings on important federal questions and rights. As a result, Mellon Bank waived its appeal rights, and the Circuit Court and the State Supreme Court had no alternative but to dismiss Mellon Bank's appeal. Cf. *Associated Petroleum Carriers v. Mutual Properties, Inc.,* 235 S. C. 195, 110 S. E. (2d) 861 (1959).

Is not the fact that Mellon Bank failed to perfect its appeal to the State Supreme Court as to Southland Mobile

Homes an adequate and independent non-federal ground precluding further review by this Court and justifying denial of its Petition for Writ of Certiorari, at least as to this Respondent?

A distinction between state substantive grounds and state procedural grounds has been recognized by this Court, and *Henry v. State of Mississippi,* 379 U. S. 443, 85 S. Ct. 56, 13 L. Ed. (2d) 408 (1964), contains probably the clearest statement of the same:

> . . . These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the state's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights." 379 U. S. at 447, 448.

Assuming for the sake of argument that Mellon Bank has federal rights that were not vindicated in the State Courts as to Southland Mobile Homes, it would be patently ridiculous to say that the State appellate procedural requirements ignored by the Bank do not serve a legitimate state interest. Requirements such as those contained in Circuit Court Rule No. 49 and § 18-9-70 are, obviously, absolutely necessary to facilitate and expedite the orderly handling of appeals, as shown by the somewhat analogous requirements concerning review by this Court. (Cf. Rules of Supreme Court Nos. 11, 13 and 22; 28 U. S. C. § 2101.) Had Mellon Bank availed itself of the opportunity, it could have applied for and possibly been granted relief from its procedural defaults at the state level. Cf. §§ 18-1-100, 18-9-110 and 18-9-120, Code of Laws of South Carolina (1976). (App. 10); *Associated Petroleum Carriers v. Mutual Properties, Inc., supra.*

This Court has previously held that where a petitioner's failure to follow the correct state appellate route (*i. e.,* failure to select the right appellate court) results in dismissal of the state appeal by a state's highest appellate court, the decision of the state court would rest on such an adequate and independent non-federal ground as to deprive this Court of jurisdiction. *Parker v. People of State of Illinois,* 333 U. S. 571, 68 S. Ct. 708, 92 L. Ed. 886 (1948); *Central Union Telephone Co. v. City of Edwardsville,* 269 U. S. 190, 46 S. Ct. 90, 70 L. Ed. 229 (1925). Mellon Bank's admitted failure to adhere to South Carolina's well defined appellate procedures justified the South Carolina Supreme Court's (and the Circuit Court's) dismissal of its appeal, and such dismissal under the circumstances likewise constitutes an adequate and independent state ground for this Court to decline review as to Southland Mobile Homes.

CONCLUSION

For the reasons set forth in the preceding argument, the Respondent, Southland Mobile Homes of South Carolina, Inc., submits that the Writ of Certiorari should be denied as to it.

Respectfully submitted,

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APPENDIX

APPENDIX

S. C. CIRCUIT COURT RULE NO. 49

Mode of preparing a case on appeal

In every appeal to the Supreme Court from matter appealable, the appellant, or his attorney shall within ten days after written notice of the filing of such matter appealable, or, if filed within term time, within ten days after the rising of the Circuit Court, give written notice to the opposite party, or his attorney, of his intention to appeal therefrom, and within thirty (30) days after such notice the appellant, or his attorney, shall prepare a case or exceptions, or a case containing exceptions (which exceptions shall have been taken and served within the time prescribed by law), and serve them on the opposite party, or his attorney, or within such further time as, upon ten (10) days' notice to the opposite party, or his attorney, the Judge who tried the cause may for good cause grant. But should the parties within the time above named, be unable to agree upon a case, then the proposed case, with the proposed amendments, and allowances and disallowances, shall be within ten days after failing to agree, referred for settlement to the Circuit Judge who heard the cause, who shall settle the same within the time and in the manner provided for settling a case in Rule 47.

The parties, if they agree on a case, or the Circuit Judge who may settle the same, must see that the case shall, as to the matter it contains, conform to the requirements of the Rules of Supreme Court in regard to the form and substance of a case for hearing before that Court.

S. C. CODE § 18-9-70 (1976).

Case and exceptions; objections; settlement.

Within thirty days after giving such notice the appellant or his attorney shall prepare a case with exceptions and serve them on the opposite party or his attorney. The respondent within ten days after service of such case may propose any objections thereto or alterations thereof, and the case shall be settled in such mode as may be provided in the rules of the Supreme Court.

S. C. CODE § 18-1-100 (1976).

Amendment to cure failure to perfect appeal.

When a party shall give, in good faith, notice of appeal from a judgment or order and shall omit, through mistake, to do any other act necessary to perfect the appeal or to stay proceedings the court may permit an amendment on such terms as may be just.

S. C. CODE § 18-9-110 (1976).

Extending time for certain steps in appeals.

The time for taking any step or proceeding in the preparation and perfection of an appeal from a circuit court to the Supreme Court, as now prescribed by law, except the time of giving notice of appeal to the opposite party, may be extended by the judge who heard the cause or by any one of the justices of the Supreme Court, upon four days' notice of such motion being first given to the opposite party.

S. C. CODE § 18-9-120 (1976).

Correction of inadvertent failure to perfect appeal.

When any party shall omit, through mistake or inadvertence, to do any act necessary to perfect an appeal or to stay proceedings, the Supreme Court may, in its discretion, permit such act to be done at any time to perfect the appeal on such terms as may be just, if the court shall be satisfied that the appeal was taken bona fide and if notice of the appeal was given as required by law.

Supreme Court, U.S.
FILED
SEP 1 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-188

MELLON BANK, N.A.,
Petitioner,

v.

SOUTHLAND MOBILE HOMES OF SOUTH CAROLINA, INC.

and

ASSOCIATES FINANCIAL SERVICES COMPANY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of South Carolina

---

BRIEF IN OPPOSITION OF ASSOCIATES FINANCIAL SERVICES COMPANY, INC.

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September 1, 1978

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-188

MELLON BANK, N.A.,
Petitioner,

v.

SOUTHLAND MOBILE HOMES OF SOUTH CAROLINA, INC.

and

ASSOCIATES FINANCIAL SERVICES COMPANY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of South Carolina

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BRIEF IN OPPOSITION OF ASSOCIATES FINANCIAL SERVICES COMPANY, INC.

QUESTION PRESENTED

Whether the Supreme Court of South Carolina properly applied and interpreted federal law in determining that petitioner was conducting branch banking activities in Sumter County, South Carolina.

COUNTERSTATEMENT OF THE CASE

This action arises out of petitioner Mellon Bank, N.A.'s ("Mellon"), financing plan entitled "The Mellon Bank Mobile Home Service Program." Respondent Southland Mobile Homes of South Carolina, Inc. ("Southland"), participated in this program. Respondent Associates Financial Services Company, Inc. ("Associates"), was the South Carolina agent for petitioner Mellon and obtained clients such as Southland for Mellon.

On December 20, 1972, Associates and Mellon executed an agreement under which Associates agreed to seek out mobile home dealers "in locations designated to Associates from time to time in writing by the Bank," [1] from whom Mellon could acquire time-sale agreements for the retail purchase of mobile homes. The stated purpose of the agreement was to assist Mellon in "further develop[ing] its retail mobile home financing business . . . ." [2] Pursuant to this agreement, Southland, an operator of mobile home retail sales lots in South Carolina, was induced to enter into The Mellon Bank Mobile Home Service Program with Mellon. Thereafter, Mellon directly financed a large number of Southland's mobile home sales under its mobile home program.

Under this program, Southland would receive only one-half of the proceeds from Mellon. The other half was held in a reserve account by Mellon. After six months, Mellon would release to Southland the remaining half, less a two percent contingency fund. Because this procedure was apparently creating tax problems, the president of Southland asked Associates to persuade Mellon to limit or "cap" his reserve "with Mellon Bank at $20,000," in

[1] Agreement between Associates Financial Services Company, Inc., and Mellon Bank, N.A., at 1 ("Agreement").

[2] Agreement at 1.

return for a personal guarantee running to Mellon and additional security.[3] On August 29, 1973, Mellon agreed to limit Southland's reserve to $20,000 and to release the excess reserve funds in return for a guarantee running to Mellon to honor chargebacks in excess of $20,000.[4] Although the guarantee Mellon requested was executed and delivered, Mellon thereafter reneged on its agreement.[5] This action by Southland for breach of contract followed.[6]

ARGUMENT

THE SUPREME COURT OF SOUTH CAROLINA PROPERLY APPLIED FEDERAL LAW AND CORRECTLY INTERPRETED THE DECISIONS OF THIS COURT IN FINDING THAT MELLON ENGAGED IN BRANCH BANKING IN SOUTH CAROLINA.

The petition's characterization of this case is involving "an attempt by the state courts of South Carolina to assert jurisdiction over an out-of-state national bank pur-

[3] Letter from W. R. Sanford, President, Southland Mobile Homes of South Carolina, Inc., to Arthur H. Henderson, Assistant Vice-President, Associates Financial Services Company, Inc., August 9, 1973, at 2 (exhibit attached to affidavit of Bruce Gordon, Operations Manager, Associates Financial Services Company, Inc., January 13, 1977 ("Gordon affidavit").

[4] Letter from M. H. Van Dyke, Assistant Vice-President, Mellon Bank, to John D. Boyd, Senior Vice-President, Associates Financial Services Company, Inc., August 29, 1973 (exhibit attached to Gordon affidavit).

[5] Letter from M. H. Van Dyke to John D. Boyd, March 4, 1974 (exhibit attached to Gordon affidavit).

[6] Southland averred in its complaint that, in reliance upon Mellon's agreement to cap its reserves, it expended large sums of money to open additional mobile home retail sales lots. When this money was not forthcoming from Mellon, Southland had to close these new lots, as well as certain of its original lots. Within one year, Southland ceased doing business.

suant to a state long-arm statute," [7] is an unfair and inaccurate description of the decisions of both of the South Carolina courts as even a casual reading of their opinions clearly reveals. The Court of Common Pleas for Sumter County and the South Carolina Supreme Court based their decisions that they had jurisdiction over Mellon on the definition of "branch" as defined by § 7(f) of the McFadden Act, 12 U.S.C. § 36(f), as interpreted by this Court's decisions in *Citizens & Southern National Bank* v. *Bougas*, 434 U.S. 35 (1977), and *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969). Only after it found that Mellon engaged in branch banking activities in Sumter County, South Carolina, within the meaning of § 36(f) and *First National Bank in Plant City* v. *Dickinson, supra*, so that it was not prevented by federal law from hearing the case, did the Court of Common Pleas go on to find that because of Mellon's substantial and significant contacts with the state, it had personal jurisdiction over Mellon under state law. Indeed, the Supreme Court of South Carolina specifically observed that "[b]oth jurisdiction and venue in actions against national banks are governed by federal statutes." [8]

The order of the Court of Common Pleas, confirming jurisdiction over Mellon, stated that the record:

> . . . conclusively shows that the Bank had full control of all activities of Associates insofar as any procedures connected with the Associates' handling of Mellon's loans in this State. It further appears that Associates was merely a service company and Mellon's agent for the consummation of the various transactions upon which this action is founded . . . .

[7] Petition for Writ of Certiorari at 5.

[8] Appendix ("App.") at 19.

> * * * *
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> Without question the exhibits and evidence presented establish that the Associates' office in Sumter, South Carolina, received checks made payable to the Mellon Bank, that it loaned money of the Mellon Bank and conducted all business necessary to be completed with the receipt of the funds and the disbursement of them pursuant to explicit directions of the Mellon Bank as to all places [sic] of procedure. Upon a review of all of the facts it would appear that branch banking was in fact taking place at the Associates' office for the benefit of Mellon throughout the tenure of the contract between these Defendants.[9]

The South Carolina Supreme Court affirmed.[10]

Mellon's high degree of involvement in and control over these transactions leave no doubt but that Associates was a "branch" or a "branch agent" of Mellon for the purpose of providing Mellon's money for the financing of mobile homes. The express purpose of the agreement between Associates and Mellon was to assist Mellon "further [to] develop its retail mobile home financing business . . . ." [11] Under the agreement, Mellon designated those geographic areas wherein Associates should seek mobile home dealers with whom to deal and Mellon approved each such dealer.[12] Furthermore, Mellon had the right to approve all credit applications and all matters relating to maximum limita-

[9] Order of the Court of Common Pleas for Sumter County, February 16, 1977, App. at 27-28, 29.

[10] Southland Mobile Homes of South Carolina, Inc. v. Associates Financial Services Company, Inc., No. 20655 (Supreme Court, April 3, 1978), App. at 17.

[11] Agreement at 1.

[12] Agreement at 1.

tions for payment. Also, Mellon owned all sales financed transactions.[13] Indeed, the very name of this financing program was "The Mellon Bank Mobile Home Service Program." Thus, the entire thrust of the operation was to develop Mellon's mobile home financing business, and Associates was a Mellon servicing organization subject to absolute Mellon control insofar as Mellon's loans in South Carolina were concerned.[14]

In this case, Mellon was not merely purchasing commercial paper in South Carolina from others who had already financed mobile home purchases as the petition suggests. To the contrary, Mellon was in name and fact the primary lender whose funds financed the purchase of the mobile homes. No other funds were involved. Mellon held back a portion of the financing from Southland to create a loss reserve in its favor, the attempted alteration of which generated this litigation.[15] The liens on the financed mobile homes were in Mellon's name and payments were made directly to Mellon.

In light of these facts, the South Carolina Supreme Court correctly applied this Court's decision in *First National Bank in Plant City* v. *Dickinson*, *supra*. There, as here, the issue was whether certain activities of a

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[13] Gordon affidavit at 1.

[14] Order of the Court of Common Pleas, Sumter County, February 16, 1977, App. at 27; Gordon affidavit at 1.

[15] Mellon's total control over these funds is illustrated in the correspondence between Associates and Mellon in which Associates recommended that Mellon limit Southland's reserve to $20,000 and even offered to cut its agent's fee "by .1% per annum and increase the Mellon Bank net rate by a similar amount if you will agree to a maximum reserve of $20,000 . . . ." Letter from John D. Boyd, Senior Vice-President of Associates, to M. H. Van Dyke, Assistant Vice-President of Mellon, December 20, 1973 (exhibits attached to Gordon affidavit).

bank constituted branch banking within the meaning of § 7 of the McFadden Act, 12 U.S.C. § 36. This Court held that the bank's operation of an armored car service to cash checks and accept deposits and its establishment of an off-premises receptacle for the receipt of packages containing cash or checks for deposit constituted branch banking activities.

The Court observed that the McFadden Act's definition of a "branch" [16] bank defines only "the minimum content," and not "the outer limits of the term." [17] Thus, it held that ". . . the term 'branch bank' at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more." [18] In *Plant City*, deposits were "received" by a bank at a location different from its chartered place of business. Here, Mellon's money was loaned from a location other than Mellon's chartered premises, and, at that same place, checks payable to Mellon Bank were accepted, all subject to express directions from Mellon. In both instances, the facility where the actual exchange of money occurs constitutes a branch. 396 U.S. at 137.[19]

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[16] The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid or money lent.

[17] 396 U.S. at 135.

[18] *Id.* (emphasis in original). The Court relied in part upon Representative McFadden's description of the definition of "branch" bank during the congressional debates:

> Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office, is a branch. 68 Cong. Rec. 5816 (1927).

396 U.S. at 134 n. 8.

[19] The Plant City bank attempted to avoid a determination that it was engaging in branch banking by use of an agency agreement

In *Independent Bankers Association of Georgia* v. *Board of Governors of the Federal Reserve System*, 516 F.2d 1206 (D.C. Cir. 1975), the court held that a national bank would be engaging in branch banking if it made mortgage loans through a separately incorporated subsidiary specializing in mortgages. The question, the court stated, is whether "in substance" the national bank "is doing business through the instrumentality of" another institution.[20] Because the mortgage company, although a different corporate entity, was "engaged in a type of activity embraced by § 36(f)—*i.e.*, lending money," [21] the court held that it must be considered a branch of the national bank under the McFadden Act. *See also, Central Bank* v. *Smith*, 532 F.2d 37 (7th Cir. 1976); *Whitney National Bank* v. *Bank of New Orleans*, 323 F.2d 290 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965); *First National Bank* v. *First Bank Stock Corporation*, 306 F.2d 937 (9th Cir. 1962).

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which provided that the bank acted as agent of the customer for all off-premises banking activities and the customers' money was not deemed to be a deposit until delivered to the bank's tellers at the home office. Here, in the agreement between Mellon and Associates, Mellon attempted to disclaim any branch banking activities by providing that "this agreement shall not create in any manner or in any circumstances an employer-employee relationship, joint venture or partnership between the Bank and Associates." Agreement at 6. The Supreme Court in *Plant City, supra*, experienced no difficulty penetrating such an agreement, stating that "while the contracting parties are free to arrange their private rights and liabilities as they see fit, it does not follow that private contractual arrangements, binding on the parties under state law, determine the meaning of the language or the reach of § 36(f)." 396 U.S. at 136. "It is the nature of the arrangement, and not the label applied to it, that determines the character of the relationship between two banking institutions." Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 323 F.2d 290, 301 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965).

[20] 516 F.2d at 1223.

[21] 516 F.2d at 1222 n. 68.

Petitioner argues that Mellon is not "located" in the State of South Carolina within the meaning of 28 U.S.C. § 1348,[22] which controls jurisdiction, and 12 U.S.C. § 94,[23] which controls venue. Under the jurisdiction statute, Mellon is deemed a citizen of South Carolina, and subject to the jurisdiction of that state's courts, if it is located there. Venue would then be proper in "any State, county, or municipal court . . . having jurisdiction in similar cases" where Mellon is located. However, since both this Court and the South Carolina Supreme Court have held that a national bank is located in any county in which it has a branch bank,[24] petitioner's argument obviously is but a restatement of the previous contention that Mellon is not engaging in branch banking in the county.

Michigan National Bank v. *Robertson*, 372 U.S. 591 (1963), upon which Mellon relies, is inapposite. The Nebraska court did not find the national bank in that case to be engaged in branch banking in the state, and indeed this issue was not even present in the case. This Court merely held that unless the provisions of 12 U.S.C. § 94 are waived, it precludes a suit against a non-resident

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[22] The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

[23] Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

[24] Citizens & Southern National Bank v. Bougas, 434 U.S. 35 (1977); Holson v. Gosnell, 264 S.C. 619, 216 S.E.2d 539 (1975), *cert. denied*, 423 U.S. 1048 (1976).

national bank for violating state usury laws.[25] The Court remanded for a determination on the waiver question.

Finally, as petitioner concedes, the South Carolina Supreme Court did not decide the issue whether Mellon waived its purported immunity from suit in South Carolina. That question, therefore, is not before this Court. *National Bank of North America* v. *Associates of Obstetrics and Female Surgery, Inc.*, 425 U.S. 460 (1976); *Michigan National Bank* v. *Robertson*, 372 U.S. 591 (1963).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1, 1978

[25] Similarly, neither Bank of America v. Whitney, 261 U.S. 171 (1923), nor National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc., 425 U.S. 460 (1976), involved branch banking activity. If so engaged, Mellon was "located" in South Carolina and amenable to its process. First National Bank in Plant City v. Dickinson, *supra*. The factual predicate for petitioner's argument, *i.e.*, ". . . all Mellon Bank did was purchase chattel paper from Associates, which had acquired the paper from Southland . . ." (petition at 8), is accurate as shown above and was not accepted by the courts below.

CERTIFICATE OF SERVICE

I hereby certify that I have caused three copies of the foregoing Brief in Opposition of Associates Financial Services Company, Inc., to be served upon each of the parties to this proceeding in accordance with Rule 33.1 of the Rules of this Court.

Dated at Washington, D.C., this 1st day of September, 1978.

GEORGE B. MICKUM, III
Counsel for Respondent
Associates Financial Services
Company, Inc.

Supreme Court, U. S.
FILED
SEP 21 1978
MICHAEL RODAK, JR., CLERK

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Respondents.

REPLY BRIEF OF PETITIONER IN RESPONSE TO RESPONDENTS' BRIEFS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Mellon Bank, N.A., submits to the Court its reply to the two separate briefs filed by each respondent in opposition to the petition for a writ of certiorari.

ARGUMENT

1. The decision of the Court of Common Pleas of Sumter County and the decisions of the Supreme Court of South Carolina do not rest upon adequate and independent state grounds.

Both the trial court and the Supreme Court of South Carolina asserted venue and jurisdiction over Mellon Bank pursuant to the South Carolina long-arm statute, South Carolina Code §36-2-803 (1976), in a transitory cause of action. This flies in the face of the venue and jurisdiction provisions of the National Bank Act, 12 U.S.C. § 94 and also in conflict with 28 U.S.C. § 1348. Jurisdiction was challenged by petitioner by special appearances at the outset (Mellon's App. pp 24-25). In sum, the South Carolina Courts at every level lacked jurisdiction over this petitioner and everything that transpired in those courts is a nullity.

After the Court of Common Pleas confirmed jurisdiction over Mellon an appeal was commenced by the Bank to the Supreme Court of South Carolina. Mellon served its proposed case and exceptions on counsel for Associates within the required time limit, but through the inadvertence of the then counsel for Mellon Bank, service was made on Southland several days late. Thus, the South Carolina Supreme Court concluded that the appeal as to Southland would not be heard. However, the issue before both the trial court and the South Carolina Supreme Court was the jurisdiction of the courts of this state over Mellon Bank in this single lawsuit. The fact that Mellon Bank's proposed case and exceptions were not timely served on one party should make no difference in the granting of this petition for a Writ of Certiorari. Pursuant to specific provisions of federal statutes, there never was any South Carolina judicial jurisdiction over Mellon Bank at any level.

The decisions cited by respondent Southland in its brief in opposition have no application here. We are mindful of the decision in *Herb vs. Pitcairn,* 324 U.S. 117 (1945). There a plaintiff brought an FELA action in a city court which the Supreme Court of Illinois held to be without jurisdiction although jurisdiction would have been proper in other courts of that state. In this Court the plaintiff attempted to assert the argument that the judgment rested upon an erroneously decided federal ground. This Court held that the judgment rested upon an adequate and independent state ground. The Court went on to say in the passage quoted on page 2 of Southland's Brief in Opposition:

> ". . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. . ."

324 U.S. at pages 125-126. This is exactly what we are asserting here. Both the trial court and the State Supreme Court of South Carolina incorrectly adjudged federal rights by making the state long-arm statute paramount to federal venue and jurisdiction statutes. This Court in *Pitcairn* went on to clarify the doctrine at 324 U.S. 128 as follows:

> "It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law. Nor will we review one until the fact that it does not do so appears of record. *But because we will not proceed with a review while our jurisdiction is conjectural it does not follow that we should not take steps to protect our jurisdiction when we are given reasonable grounds to believe it exists. . .*" (emphasis added)

Our position here is the very simple proposition that the state courts in South Carolina at any level could not have properly asserted jurisdiction over this petitioner, For them to assert otherwise in direct conflict with federal statutes cannot possibly constitute "adequate state grounds."

2. The decisions of the Supreme Court of South Carolina and the Court of Common Pleas for Sumter Court were clearly erroneous in holding that petitioner was operating a branch bank in Sumter County.

The McFadden Act at 12 U.S.C. § 36(c) does not permit a national bank to establish a branch other than within the state in which the bank is headquartered. National banks frequently purchase commercial paper from sources in other states through agents or otherwise. They also enter into participation agreements on construction mortgage loans with banks in other states. In this country there are financial centers in large cities which in effect export capital through these means, and it is a fact of life in a small state like South Carolina that capital must be imported from national banks in other states through these means. It is contrary to the realities of the financial world and the intent of the McFadden Act to hold that such activities constitute branch banking in other states. In the case at bar, the initial credit was extended to purchasers from Southland by Southland. The installment obligations were then assigned and sold to Mellon Bank via Associates. There was no money advanced by Mellon Bank to the original obligors. It was, in essence, the identical operation before this Court in *Michigan National Bank v. Robertson,* 372 U.S. 591 (1963). In *Robertson* apparently no issue was raised about branch banking, but the Court clearly held that the Michigan bank could not be sued in Nebraska under the Nebraska usury laws because of the clear provisions of 12 U.S.C. § 94.

In its brief, Associates cites *Independent Bankers Association of Georgia vs. Board of Governors of the Federal Reserve System,* 516 F 2d 1206 (D.C. Cir. 1975). In essence, the Court of Appeals for the District of Columbia did not make a final decision on the merits and simply remanded the matter for adjudication by the Federal Reserve Board. The question raised in that case was whether a mortgage loan company in Georgia constituted a branch of a bank which was owned by the same holding company in Georgia. This case has no relevance here. There is no corporate relationship between Mellon Bank and Associates or Mellon Bank and Southland.

The *Whitney* case also cited by Associates involves some corporate relationships and banking activities, all of which took place within the State of Louisiana. The Court of Appeals for the District of Columbia held that an affiliated corporation constituted a branch of another banking corporation. The Supreme Court simply held that the controversy could not be decided without further consideration by the Federal Reserve Board and remanded the case for that purpose. *Whitney National Bank v. Bank of New Orleans,* 323 F. 2d 290 (D.C. Cir. 1963), rev'd. 379 U.S. 411 (1965).

3. The question of whether Mellon Bank waived its immunity from suit in South Carolina is properly before this Court.

While it is true that the Supreme Court of South Carolina decisions are silent on the question of waiver, by implication it made such a decision by affirming the decision of the Court of Common Pleas for Sumter County. As pointed out in our petition, the Court of Common Pleas for Sumter County erroneously held that Mellon Bank had waived its immunity (Mellon's App. p. 29). As we argued previously, there was on basis for holding that there was a waiver. Throughout this litigation, Mellon Bank has specifically contested jurisdiction and has done nothing to voluntarily submit itself to the jurisdiction of South Carolina courts. To assert that Mellon Bank, by conduct prior to the inception of this law suit, could waive jurisdiction is to create a substitute standard for that provided for in 12 U.S.C. § 94.

CONCLUSION

WHEREFORE, for the additional reasons set forth herein, petitioner submits that a Writ of Certiorari should be granted.

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